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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES CHAMBERLAIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STEWART R. JAFFY,
42 E. Gay Street, Columbus, Ohio,
Counsel for Petitioner.

THEODORE LUTZ,
LARRY L. INSCORE,
3 North Main St., Mansfield, Ohio.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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No. _____

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JAMES CHAMBERLAIN,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner James Chamberlain prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in State of Ohio vs. James Chamberlain on December 8, 1965, motion for rehearing denied on January 19, 1966.

CITATIONS TO OPINIONS BELOW

The Common Pleas Court of Richland County, Ohio, did not render a written opinion.

The opinion of the Court of Appeals of Richland County, Ohio, Fifth District, is unreported and is printed in Appendix A, P. ...

The Supreme Court of Ohio did not render an opinion. Copies of the entries summarily overruling petitioner's motion for leave to appeal, Appendix B, P. ..; dismissing petitioner's appeal as of right, Appendix C, P. ..; and denying rehearing, Appendix D, P. .., are printed in the Appendices as noted.

JURISDICTION

The statutory provision believed to confer jurisdiction to review the judgment of the Supreme Court of Ohio entered on December 8, 1965, motion for rehearing denied January 19, 1965, by writ of certiorari is United States Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED

1. Were petitioner's rights under the Fourteenth Amendment of the United States Constitution violated by the refusal of the Ohio courts to grant him leave to withdraw a plea of guilty entered five days after his arrest to a felony charge for which probation is unavailable upon application made six days later and prior to sentence when the plea of guilty by petitioner was induced:

(a) by the fact that a written confession was elicited from petitioner by police officials without effectively advising him of his right to counsel and his right to remain silent and by making false representations to petitioner;

(b) by erroneous advice to petitioner by his counsel, who first contacted petitioner after the confession was elicited, to the effect that he was entitled to probation consideration if he pleaded guilty because he had no prior criminal record and by the failure of counsel to advise petitioner that he would be required to submit to a psychiatric examination as a result of which examination it was possible he would be indefinitely committed to a mental institution; and

(c) by anxiety and concern for his family and the desire to spare them adverse publicity?

2. Does a plea of guilty constitute an irrevocable waiver of the constitutional right to a fair trial under the Fourteenth Amendment of the United States Constitution?

3. Do police officers, concealed behind a trick window-mirror during the course of an exploratory search, who

observe and record on motion picture films the activities of persons using a public toilet without the knowledge of those persons, violate the constitutional rights of those persons under the Fourth Amendment as applicable to the state under the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution as well as the Fourth, Fifth and Sixth Amendment effects on due process clause of the Fourteenth Amendment.

The federal constitutional provisions together with Ohio statutory provisions referred to in this petition are set forth in Appendix E, P. ...

STATEMENT OF THE CASE

Petitioner was sentenced on March 10, 1965, to not less than one nor more than twenty years in the Ohio State Penitentiary for violation of Ohio Rev. Code Sec. 2905.44 (Sodomy) by the Common Pleas Court of Richland County, Ohio. Prior to sentence he had been referred for psychiatric examination to the Ohio Department of Hygiene and Correction for a period of not less than thirty nor more than sixty days as required by Ohio Rev. Code Sec. 2947.25 as a result of which he was found to be neither a psychopathic offender nor a mentally deficient offender. If petitioner had been found to be a psychopathic offender or a mentally deficient offender, the prison sentence would have been suspended pending an indefinite commitment to a state mental institution.

Petitioner is thirty-five years of age; is a life-long resident of Richland County, Ohio; has been married for thir-

teen years; is employed; and lives with his wife and three young children. (R. 82).

On Friday, August 24, 1962, at approximately 3:00 o'clock P.M., petitioner, in response to a telephone request, reported to the Mansfield, Ohio Police Department where he was taken into an interrogation room. (R. 84, 87) Prior to this occasion petitioner had never been arrested nor otherwise interrogated by police officers and had no criminal record.

During the course of the interrogation by the police, a police lieutenant told petitioner that the police had motion pictures taken of him on August 17, 1962, during the course of a surveillance from behind a trick mirror in the Central Park men's restroom and that petitioner was charged with the crime of sodomy. (R. 87, 89) Petitioner testified that the police lieutenant advised him to make a confession in order to avoid publicity for his parents and his wife and children and that it would go easier for him if he did. (R. 88) This was denied by the police lieutenant. (R. 112) The police lieutenant testified that in response to an inquiry by petitioner's employer who had accompanied him to the police station as to what could be done responded: "There's nothing, it's a step from this, this is it, we got you." (R. 110) As a result of the interrogation a written confession was elicited from petitioner to the charge of sodomy on the day of his arrest.

Following the confession two police officers advised petitioner to the effect that it would go easier for him because he was cooperating and that he should receive probation because he had no prior record. (R. 90, 92).

After the confession, petitioner was visited by an attorney selected by petitioner's family. Petitioner's attorney testified that petitioner was greatly distraught and anxious to avoid adverse publicity for his family. (R. 49, 58). On

Monday, August 27, 1962, a bill of information pursuant to Ohio Rev. Code Sec. 2941.021 was filed charging petitioner with sodomy. Two days later petitioner appeared in the Common Pleas Court of Richland County, Ohio, represented by his counsel, who first contacted petitioner after he had signed a confession, and entered a plea of guilty. Thus, less than five days elapsed from petitioner's initial contact with the police on Friday at 3:00 o'clock P.M. and his entering a plea of guilty to a felony charge for which there is no probation and for which he could have conceivably been committed indefinitely to a mental institution.

Petitioner's attorney had erroneously advised him prior to the time he entered the plea of guilty that he was eligible for probation consideration (R. 50, 69, 70) and at no time discussed with petitioner whether there were grounds for the charge of sodomy against petitioner. (R. 58). Neither the trial court nor petitioner's counsel advised petitioner that if he pleaded guilty he would be required to undergo a psychiatric examination which could result in indefinite commitment to a penal institution.

Sodomy is one of seven crimes which are not probationable offenses in Ohio. Ohio Rev. Code Sec. 2951.04.

Also, under Ohio Rev. Code Sec. 2947.24 and 2947.25, a person convicted of sodomy is required to undergo a psychiatric examination and if found to be a psychopathic offender or a mentally deficient offender is committeed indefinitely to a mental institution during which commitment sentence is suspended.

On September 4, 1962, six days after the plea of guilty had been entered and prior to sentence, petitioner filed a written motion to withdraw the plea of guilty and enter a plea of not guilty. That motion as well as petitioner's written motion for reconsideration were denied by the trial court.

Petitioner sought leave to withdraw the plea of guilty on the grounds that he erroneously believed that he was entitled to probation consideration if he entered a plea of guilty; that he was greatly distraught at the time the plea of guilty was entered; that he was induced to enter the plea of guilty by false representations by the police to the effect that the court would go easy on him and by erroneous advice of his attorney that he was eligible for probation consideration; that the method of obtaining evidence, *i.e.* surreptitious, exploratory motion picture taking of the users of a public toilet constituted an unreasonable search and seizure under the Fourteenth Amendment of the United States Constitution; that the denial of petitioner's right to trial under the facts of this case constitute denial of petitioner's right to due process under the Fourteenth Amendment of the United States Constitution.

Petitioner twice filed appeals in the Ohio courts which were dismissed on procedural grounds not pertinent to this cause.

Thereafter, petitioner was sentenced on March 10, 1965, to not less than one nor more than twenty years in the Ohio State Penitentiary for violation of Ohio Rev. Code Sec. 2905.44 by the Common Pleas Court of Richland County, Ohio. Prior to sentence he had been referred for psychiatric examination to the Ohio Department of Hygiene and Correction for a period not less than thirty nor more than sixty days as required by Ohio Rev. Code Sec. 2947.25 as a result of which he was found to be neither a psychopathic offender nor a mentally deficient offender.

Petitioner appealed to the Court of Appeals of Richland County, Ohio, which considered the federal constitutional questions and affirmed the trial court. Motion for leave to appeal to the Supreme Court of Ohio was overruled on December 8, 1965, and appeal as of right based upon the

federal constitutional grounds was dismissed on December 8, 1965. Petitioner's motion for rehearing in the Supreme Court of Ohio was dismissed on January 19, 1966.

REASONS FOR GRANTING THE WRIT

1. The disposition of most criminal cases is accomplished by pleas of guilty thereby waiving the accused's various constitutional rights.

This Court in recent years has decided many cases the effect of which has been to breathe substance into the due process requirements of the Fourteenth Amendment, E.g., *Mapp v. Ohio,* 367 U.S. 643 (1961); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Griffin v. California,* 380 U.S. 609 (1965); *McLeod v. Ohio,* 381 U.S. 356 (1965); *Beck v. Ohio,* 379 U.S. 89 (1964). The reaction to the Court's decisions has not been completely favorable. See, e.g., "Protecting the Public from *Mapp v. Ohio,*" Kingsley A. Taft, Chief Justice, Ohio Supreme Court, 50 A.B.A.J. 815 (1964).

If a plea of guilty entered as a result of erroneous advice of counsel, misrepresentations by police, and misunderstanding as to the effect of the plea and anxiety on the part of an accused constitutes an irrevocable waiver of the right to a fair trial, then the other due process requirements of the Fourteenth Amendment are diluted. The right to be secure against unreasonable searches and seizures, *Mapp v. Ohio, supra;* the right to counsel, *Escobedo v. Illinois, supra,* and *Gideon v. Wainwright, supra;* the right to be silent and the right not to be a witness against one's self, *Escobedo v. Illinois, supra,* are then available to preclude unconstitutional convictions by trial but not to preclude convictions by inducing unwitting pleas of guilty. In addition to diluting the above ancillary rights to due process under the Fourteenth Amendment, the right to a fair trial

is lost and an accused is deprived of his liberty without any reliable determination of guilt.

When a capital crime is involved, pleas of guilty in some jurisdictions cannot be accepted. See, *People v. Ballentine,* 39 Cal. 2d 193 (1952). It is perhaps arguable based upon the Fifth and Fourteenth Amendments of the federal constitution that a person should not be deprived of his liberty in any event solely upon a plea of guilty.

At any rate a plea of guilty should not constitute an irrevocable waiver of the right to a fair trial when a person's liberty is at stake, prompt application is made to withdraw the plea, and the evidence indicates the guilty plea was unwittingly entered under improper inducement.

Unlike the *Mapp* and *Escobedo* cases, *supra,* in which the argument was raised that the police were being deprived of indispensible means to combat crime, and unlike virtually all cases involving constitutional questions, there is no opposing argument of any substance to the proposition that an accused should be entitled to withdraw a plea of guilty when application is promptly made. And this would seem to be true even if, unlike the case at bar, the accused had no valid reason to withdraw the plea of guilty but requested to do so prior to sentence and disposition of the case.

The presumption against waiver of constitutional rights applicable to the federal government and the standard that waiver must be made with complete understanding, *Johnson v. Zerbst,* 304 U.S. 458 (1938), should be applied in this case.

The police allegedly obtained evidence against petitioner by making observations and taking pictures through a trick mirror incident to an exploratory search of the users of a public toilet facility. By authority of *Mapp v. Ohio,* 367 U.S. 643 (1961); *Bielicki v. Superior,* 21 Cal.

Rptr. 553 (1962); *Britt v. Bielicki*, 24 Cal. Rptr. 849 (1964); *But see, Smayda v. United States*, 354 F 2d 251; *cert den.*, 15 L ed 2d 47 (1966), the substantial question of whether the search was conducted in violation of constitutional rights under the Fourteenth Amendment is raised. That such arbitrary, exploratory police surveillance is widespread is evidenced by the cases cited.

The search and seizure question should not be extinguished by the expedient of making irrevocable a plea of guilty entered unwittingly.

The waiver standard of *Johnson v. Zerbst, supra,* should be applied. See, *McLeod v. Ohio,* 378 U.S. 582, 381 U.S. 356, in which a case was remanded to the Supreme Court of Ohio for reconsideration in light of *Massiah v. United States,* 377 U.S. 201 (1964), a case which arose in the federal courts and involved application of the Sixth Amendment. Implicit in the *McLeod* case, *supra,* is that due process under the Fourteenth Amendment requires observance of the standards laid down by the other amendments designed to protect individual liberty from federal action.

2. The decision of the court below is believed to be erroneous.

When petitioner entered the plea of guilty, he was under the influence of the following misconceptions as to the effect of that plea.

A. He believed he was entitled to probation consideration if he entered a plea of guilty to the crime of sodomy. Ohio Rev. Code Sec. 2951.04 unequivocally precludes placing a person convicted of sodomy on probation.

B. He had not been advised either by the court or by his counsel and did not know that a plea of guilty required that he be subjected to a psychiatric examination pursuant to Ohio Rev. Code Sec. 2947.25 as a result of which, if the findings had been that he was a psychopathic offender or a

mentally deficient offender, he would have been committed to a state mental institution followed by incarceration in the Ohio State Penitentiary for a period of not less than one nor more than twenty years pursuant to Ohio Rev. Code Secs. 2947.24 and 2905.44.

The misconceptions were planted in petitioner's mind by policemen and petitioner's own counsel.

In addition to the misconceptions as to the effect of a plea of guilty, petitioner was filled with anxiety and concern for his family and was anxious to minimize adverse publicity which he was led by the police to believe could be accomplished by entering a plea of guilty.

He was induced to sign a written confession within the three-hour period following his arrest without being effectively advised of his right to counsel and his right to remain silent. *Escobedo v. Illinois, supra,* and *McLeod v. Ohio, supra.*

Although it does not appear in the record, petitioner also apparently was induced to indicate that he would waive his right to consideration of his case by a grand jury, since a bill of information signed by the prosecuting attorney was filed on the Monday following his arrest late Friday afternoon. Under Ohio law, an accused must waive in writing in open court prosecution by indictment. Ohio Rev. Code Sec. 2941.021. As a matter of common-sense practice, prosecuting attorneys do not bother to file a bill of information without an indication from the accused that he is willing to waive prosecution by indictment.

It is uncontradicted in the record that petitioner was seriously agitated and distraught at being arrested and charged with the crime of sodomy and that he was anxious about his family.

Finally and very important is the time element involved. In less than five full days following his initial appearance at the police station, petitioner had entered a plea of guilty to a felony for which probation does not lie and which conceivably could have resulted in an indefinite commitment to a state mental institution followed by incarceration in prison if and when the commitment terminated. Six days after the plea of guilty was entered and prior to sentence he filed a written motion to withdraw the plea of guilty. The motion was denied. Later he filed a motion to reconsider the application to withdraw the plea of guilty at which time a hearing was had in which the facts set forth in this petition were elicited. Application to withdraw the plea of guilty was again denied.

It is incomprehensible that the State of Ohio sanctions convictions upon facts as set forth in this case. If petitioner is guilty, then the State of Ohio is inconvenienced to the extent necessary to conduct a trial. If he is not guilty, then he and his family suffer the greatest of injustices. The competing interests of the state and the accused in this case weigh overwhelmingly in favor of the petitioner. The State of Ohio has nothing to lose. As the court stated in *Brooks v. State*, 17 Ohio App. 510 (1923):

> "... If the accused was guilty as charged, how could the ends of public justice be defeated by his trial by jury? And if not guilty as charged, why should he suffer a penalty for a crime of which he was not guilty under the law? Neither the interests of the community nor of the state could have suffered by permitting him to change his plea, for, if guilty, the state would have had the right to establish the fact, and, if innocent, or guilty of a lesser crime than that charged, opportunity should have been granted to him to test the issue raised by the indictment..."

CONCLUSION

Based upon the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

STEWART R. JAFFY
42 East Gay Street
Columbus 15, Ohio
Counsel for Petitioner.

THEODORE LUTZ
LARRY L. INSCORE
Attorneys at Law
3 North Main Street
Mansfield, Ohio

APPENDIX A

IN THE COURT OF APPEALS OF RICHLAND COUNTY, OHIO

FIFTH DISTRICT

Case No. 896

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES CHAMBERLAIN,

Defendant-Appellant.

OPINION

In this case the defendant-appellant has been represented by counsel of his own choosing throughout the proceedings.

After careful review of the complete record we do not find that the trial court abused its discretion in refusing to permit the defendant-appellant herein to withdraw his plea of guilty; neither do we find any deprivation of the defendant's constitutional right of trial by jury.

The assigned errors are overruled. The judgment sentencing the defendant is affirmed. Journal Entry to be submitted.

Judgment affirmed.

/s/ LELAND RUTHERFORD
/s/ D. DEANE MCLAUGHLIN
/s/ PAUL D. VAN NOSTRAN

APPENDIX B

IN THE SUPREME COURT OF OHIO

Case No. 39,778

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES CHAMBERLAIN,

Defendant-Appellant.

[Filed December 8, 1965]

ORDER OVERRULING MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR RICHLAND COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

IN THE SUPREME COURT OF OHIO

Case No. 39,778

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES CHAMBERLAIN,

Defendant-Appellant.

[Filed December 8, 1965]

ORDER DISMISSING APPEAL AS OF RIGHT FROM THE COURT OF APPEALS FOR RICHLAND COUNTY

This cause, here on appeal as of right from the Court of Appeals for Richland County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

APPENDIX D

IN THE SUPREME COURT OF OHIO

Case No. 39,778

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES CHAMBERLAIN,

Defendant-Appellant.

[Filed January 19, 1966]

ORDER DENYING REHEARING

It is ordered by the court that rehearing in this case is denied.

It is also ordered by the Court that issuance of the mandate and entry in this case be, and the same hereby is, stayed for a period of twenty (20) days from this date to enable counsel for appellant to apply for an indefinite stay of execution while the case is pending in The Supreme Court of the United States.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

FOURTH AMENDMENT: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of Ohio

All references are to Page's Ohio Revised Code Annotated, 1953 Edition or to the 1965 Supplement if designated 1965 Supp.

Ohio Rev. Code Sec. 2905.44

No person shall have carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being.

Whoever violates this section is guilty of sodomy and shall be imprisoned not less than one nor more than twenty years.

Ohio Rev. Code Sec. 2941.021 (1965 Supp.)

Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, waives in writing and in open court prosecution by indictment.

Ohio Rev. Code Sec. 2947.24 (1965 Supp.)

Sections 2947.24 to 2947.29, inclusive, of the Revised Code shall be administered by the criminal courts in dealing with mentally deficient offenders and psychopathic offenders in cases in which the court finds that the imposition or continued enforcement of the applicable penal sentence will not afford to the public proper protection against possible future criminal conduct of such mentally deficient or psychopathic offenders.

As used in such sections:

(A) "Mental deficient offender" means any person who is adjudged mentally retarded, as defined in section 5125.-011 (5125.01.1) of the Revised Code, who exhibits criminal tendencies and who, by reason thereof, is a menace to the public.

(B) "Psychopathic offender" means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control.

(C) "Indefinite commitment" means commitment to the department of mental hygiene and correction, which commitment is subject to termination only by an order of release in the manner prescribed in sections 2947.24 to 2947.29, inclusive, of the Revised Code.

(D) "Court" means any court of record in which a mentally deficient offender or psychopathic offender was convicted of the crime for which he is awaiting sentence or has been sentenced.

(E) "Psychiatric examiner" or "psychiatrist" means a person licensed to practice medicine in this state, whose training and experience includes a minimum of five years in the treatment of mental diseases.

(F) "Psychologist" means a person who has been graduated with the degree of doctor of science or of philosophy, in psychology from a graduate school of a university on the approved list of the association of American universities, and whose training and experience includes a minimum of two years' practice in clinical psychology after obtaining either of the above degrees.

So far as practicable, without undue interference with the orderly conduct of the business of the court, all hearings and other proceedings relating to any mentally deficient or psychopathic offenders shall be had before the judge who presided at the trial resulting in the conviction upon which such offender is dealt with under sections 2947.24 to 2947.29 inclusive, of the Revised Code, if such judge is still a judge of the court having jurisdiction.

Ohio Rev. Code Sec. 2947.25 (1965 Supp.)

After conviction and before sentence, a trial court shall refer for examination all persons convicted under section 2903.01, 2905.01, 2905.02, 2905.03, 2905.04, 2905.07, or 2905.44 of the Revised Code, to the department of mental hygiene and correction or to a state facility designated by the department, or to a psychiatric clinic approved by the department, or to three psychiatrists. Prior to sentence the court may refer for such examination any person who has been convicted of any felony except murder in the first degree where mercy has not been recommended, or any misdemeanor involving a sex offense, or in which abnormal sexual tendencies are displayed, when it has been suggested or appears to the court that such person is mentally ill, or a mentally deficient offender or a psychopathic

offender. Reference to the department, clinic, or psychiatrists shall be for a period of not more than sixty days.

The department, clinic, or psychiatrists shall make a careful examination of such person and furnish to the court a report in writing of the finding as to the mental condition of the person at the time of examination, together with such recommendations, suggestions, and opinions as may be helpful to the court, which report shall also contain the names and addresses of the parties making the examination. Such report is a public record and becomes a part of the files in the case but shall not be spread at large upon the journal. A certified copy of such report shall be served upon such person and his attorney of record within three days after the filing thereof with the court. If any psychiatric examiner or psychologist not on the staff of any such psychiatric clinic or the department or a state facility designated by the department is so appointed, the cost thereby incurred shall be determined by the court and allowed and taxed as costs and paid in the same manner as witness fees in criminal cases.

The court shall conduct a hearing thereon not earlier than ten nor later than thirty days after the service of such copies of the report. Both the state and such person, his guardian, or next friend may appear in person or by counsel at such hearing, subpoena, examine, and cross-examine the examiners making the report, regardless of the part of the state in which the examiners may live, and produce witnesses, both lay and expert, as to the mental condition of such person. In the event and to the extent that no subpoenas are issued for the examiners to appear at the hearing, the report or such part of it as was prepared by the examiners for whom no subpoena was issued, is prima-facie evidence.

If upon consideration of such report and such other evidence as is submitted, the court finds that such person

is mentally ill as defined in section 5122.01 of the Revised Code and is subject to hospitalization as provided in section 5122.15 of the Revised Code or is a mentally deficient offender or a psychopathic offender as defined in section 2947.24 of the Revised Code, the court shall enter such finding on the records and shall impose the appropriate sentence for the offense of which the person was convicted. At the same time the court shall enter an order of indefinite commitment of such person to the department, during the continuance of which the execution of sentence shall be suspended. Thereupon such person shall be sent to an appropriate institution designated by the department. If the department, because of lack of facilities, fails to designate an appropriate institution, such person shall be sent to the institution to which he would have been sentenced had he not been adjudged mentally ill, a mentally deficient offender, or a psychopathic offender. Such orders of indefinite commitment shall show the offense of which such person was convicted and the minimum and maximum penalties therefor. Certified copies of said order and the reports of the examiners, unless submitted by the department, shall be sent to the department. Every order of indefinite commitment is a final order.

Motions for a new trial, bails, and appeal on questions of law are applicable to such cases.

Any finding under sections 2947.24 to 2947.29, inclusive, of the Revised Code, that a person is mentally ill, a mentally deficient offender, or a psychopathic offender, is a final order.

Ohio Rev. Code Sec. 2951.04

No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall be placed on probation.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Brief for Respondent In Opposition

REX LARSON,
WILLIAM F. MCKEE,
3 North Main Street, Mansfield, Ohio,
Counsel for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Common Pleas Court of Richland County, Ohio, did not render a written opinion. The opinion of the Court of Appeals of Richland County, Ohio, Fifth District is unreported, (Appendix A of Petition). The Supreme Court of Ohio did not render a written opinion, but entered an entry overruling petitioner's motion for leave to appeal (Appendix B of Petition), entered an entry dismissing petitioner's appeal as of right (Appendix C of Petition), and entered an entry denying petitioner's motion for rehearing (Appendix D of Petition).

JURISDICTION

The purported jurisdictional requisites as set forth in the petition are not applicable, and there is no basis for jurisdiction in this court.

QUESTIONS PRESENTED

1. Is there a violation of petitioner's rights under the Fourteenth Amendment of the United States Constitution by the refusal of Ohio courts to grant petitioner's motion to reconsider a motion to withdraw a plea of guilty filed ten (10) months after the original order overruling the motion to withdraw the plea of guilty when evidence before the court indicated:

(a) Petitioner was accompanied by his employer to the police station at the time of arrest, and petitioner was advised of his right to counsel; of his right to remain silent; of the nature of the charge against him; and of the penalty provided by the statutes for such charge.

(b) Because of a calculated risk knowingly taken by petitioner and his counsel attempting to introduce error into the proceedings.

2. Is a plea of guilty entered by petitioner when accompanied by counsel and fully advised of the nature and cause of the offense with which he is charged subject to withdrawal without adequate cause?

3. Should this court reverse its position earlier adopted that secret observations by police officers of a public room do not constitute an illegal search and seizure under the Fourth Amendment of the United States Constitution as applicable to the State of Ohio under the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves identical factual situations in which this court has already found that there are no constitutional or statutory provisions involved.

STATEMENT

On August 24, 1962, petitioner, accompanied by his employer, entered the Mansfield Police Department at the request of the police and was taken into custody by a police lieutenant, who advised him of his right to counsel and of his right to remain silent. (R-109, 110) The lieutenant further advised petitioner that he was charged with sodomy and that the penalty for sodomy was one to twenty years, (R-138), and that under Ohio law there was no probation for sodomy. (R-112). Upon being advised of the charge and of his rights, petitioner gave a written statement to the police lieutenant and initialed the first paragraph of such statement that he had been advised of his right to counsel; that he did not have to make a statement, and that if he did, the same could be used against him; and that no promises had been made to him by the police officers. (R-104).

Petitioner immediately obtained counsel and requested that he be brought before the Common Pleas Court on a Bill of Information containing a charge of sodomy, and defendant, with counsel, on August 29, 1962, appeared in the Common Pleas Court of Richland County, and in writing waived irregularities in service, waived indictment by Grand Jury, and entered a plea of guilty. Pursuant to law, the court referred petitioner to Lima State Hospital for examination prior to sentence.

On September 4, 1962, petitioner, by counsel, filed a motion to strike the journal entry referring petitioner to

Lima State Hospital and also filed a motion to withdraw the plea of guilty, in which motion petitioner made no representations that he had not been advised of his rights or that he had been promised probation. On October 8, 1962, petitioner, represented by counsel, appeared for argument before the Court of Common Pleas, at which time both motions were considered by the court and overruled.

Petitioner then, by counsel, filed a Notice of Appeal in the Court of Appeals for Richland County, in which no specific assignment of error was made, but primarily arguing as error the overruling of the motion to strike the journal entry, and incidentally noting that the motion to withdraw the plea of guilty was overruled. While such appeal was pending, original counsel withdrew from the case and was replaced by present counsel, Lutz and Inscore, who raised the same questions as to the motion to strike the entry both by brief and by oral argument. Original counsel had formerly been an employee and assistant of present counsel, Theodore Lutz. (R-54). The Court of Appeals dismissed the Notice of Appeal for want of final order and certified its action to the Supreme Court of Ohio. The Certification of the questions involved to the Supreme Court of Ohio was then dismissed upon motion of present counsel for petitioner, and the matter remanded to the Common Pleas Court of Richland County, Ohio.

Upon remand to the Common Pleas Court, petitioner on July 3, 1963, then filed a motion for reconsideration of his motion to withdraw the plea of guilty and for the first time in the proceedings, made allegations that he had not been advised of his rights and that representations had been made that he might be considered for probation. On July 29, 1963, the Common Pleas Court had a complete hearing and took testimony on said motion to reconsider, at which

hearing it was adduced that petitioner had been fully advised of his rights by the police officers; that petitioner was a high school graduate and had had two semesters of college (R-82); that prior to entering the plea initially, petitioner's original counsel had read him the applicable sections of the Ohio code concerning the offenses in which cases probation was not permitted and Attorney General's opinion that there was no probation and discussed the calculated risk that might be taken to attempt to obtain probation (R-53). This hearing further adduced evidence that the first reference to probation made to petitioner was by his own counsel rather than police officers (R-97, 98); and that prior to entering the plea petitioner's counsel advised the State that the police officers had advised petitioner of the fact that there was no probation for sodomy before taking a statement from petitioner (R-125). Upon this evidence the Common Plaes Court overruled the motion for reconsideration.

The action of the Common Pleas Court in overruling the motion for reconsideration was assigned as error in the Court of Appeals of Richland County, Ohio. This assignment of error was overruled by the Court of Appeals and motion for leave to appeal permitted by the Supreme Court of Ohio. Upon consideration thereof, the Supreme Court of Ohio remanded the matter to the Common Pleas Court for want of a final order as defendant had not as yet been examined by Lima State Hospital in accordance with the original order of the Common Pleas Court.

Upon remand, petitioner was examined by Lima State Hospital and found not to be a psychopathic offender nor a mentally deficient offender, and on March 10, 1965, petitioner was finally brought before the Common Pleas Court of Richland County, Ohio, and was sentenced to not less

than one, nor more than twenty years in the Ohio State Penitentiary.

For the third time petitioner assigned error in the Court of Appeals of Richland County, Ohio, based upon the action of the Common Pleas Court in overruling petitioner's motion for reconsideration. The Court of Appeals found that there was no abuse of discretion on the part of the Common Pleas Court, and that all proceedings were in accordance with law. Petitioner then, for the third time, brought the matter before the Supreme Court of Ohio on motion for leave to appeal and appeal as of right, which motions were overruled on December 8, 1965. Petitioner's motion for rehearing in the Supreme Court of Ohio was dismissed on January 19, 1966.

ARGUMENT

All authorities presented by petitioner related to instances in which the accused has been denied the right to counsel or has been induced to enter a plea through misrepresentations of police officers. The State would fully concur that in such instances where there has not been a knowledgeable waiver of the accused's rights that such waiver should not be binding upon the accused.

The present situation, however, presents solely questions of fact as to whether or not any misrepresentations exist or as to whether or not the present petitioner was fully advised of his rights. The test has long been in Ohio that the trial court must consider and determine such questions, which action was taken by the trial court. The record affirmatively shows that defendant was advised by the police upon arrest of his right to counsel, that he need not make a statement, and that the same might be used against him if made; that there was no probation for the offense with

which he was charged, and of all the facts and evidence leading to his arrest. Petitioner immediately obtained counsel, who fully advised him of the law relating to the charge against petitioner. The method of procedure originated by petitioner's original counsel was pursued on appeal by present counsel, who now claims this action was erroneous. The sole question presented is thus one of fact and not one of law.

In attempting to raise an issue of law, rather than of fact, present counsel for petitioner attempt to raise a question of search and seizure. This question is identical with that question heretofore presented to this court in Case No. 223 in the Supreme Court of the United States, October term, 1963, on petition for a writ of certiorari to the Supreme Court of Ohio, being styled Ralph Arlee Poore, Newton Townsend, Edward Nixon, William Joseph Glass, petitioners, vs. James J. Mayer, Common Pleas Judge of Richland County, Ohio, State of Ohio, respondents, in which present counsel for petitioners was then counsel for petitioners, and in which present counsel for respondents was then counsel for respondents.

CONCLUSION

It is apparent that the sole question raised by petitioner is one of fact and that this question was not raised at the time of plea or of initial action by the Common Pleas Court, but was raised some ten (10) months later upon motion for reconsideration. That petitioner in three hearings before the Common Pleas Court, before the Court of Appeals of Richland County, Ohio, and before the Supreme Court of Ohio, has fully been accorded all constitutional rights and review of the factual questions, and that there is no issue of law presented for consideration by this court.

Respectfully submitted,

REX LARSON.
WILLIAM F. MCKEE,
3 North Main Street,
Mansfield, Ohio,
Counsel for Respondent.